

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service	)	WT Docket No. 98-169 RM-8951
	)	
Amendment of Part 95 of the Commission’s Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services	)	WT Docket No. 95-47 RM-8476 (proceeding terminated)

To: The Commission

**Reply Comments of  
Kingdon R. Hughes  
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**Background**

Kingdon R. Hughes (“Hughes”), pursuant to the Federal Communications Commission’s *Notice of Proposed Rule Making* (“NPRM”) in the above captioned matter, hereby submits reply comments on the Commission’s various proposals under consideration. As mentioned in his comments, Hughes currently holds seven Interactive Video Data Service (IVDS) licenses for the Philadelphia, Pennsylvania, area and one IVDS license for Duluth, Minnesota, as a result of participation in the IVDS lottery held September 15, 1993, and the Commission’s IVDS auction in July 1994. Hughes has invested over \$2,250,000 to acquire licenses, pay legal fees and interest, and sponsor development, testing and deployment of new IVDS equipment. To date, that investment has been in vain, primarily due to the technical restrictions currently imposed on the service.

## Reply Comments to the NPRM

### **Regulatory Status and Permissible Communications**

Hughes, in his comments, agreed with the Commission's proposal to allow the provision of commercial mobile radio service. There was unanimous support in the comments for the proposal. Hughes notes that In-Sync Interactive Corporation ("In-Sync") suggests that 218-219 MHz licensees be required only to minimally identify their specific offerings.<sup>1</sup> Hughes concurs that licensees should not be required to make detailed filings describing offerings. Hughes also reiterates that RTU-to-RTU communications should be allowed whether the licensee is providing CMRS or PMRS offerings.

### **License Term**

The majority of the comments support a 10-year license term. Hughes continues to believe that a 10-year license term is appropriate for existing licenses obtained in either lottery or auction and for all new 218-219 MHz licenses. Community Teleplay, Inc. ("CTI") did not support licenses of lottery winners being automatically extended because lottery winners will, "simply wait another five years ... before constructing their systems."<sup>2</sup> Hughes disagrees. CTI's statement is totally without foundation. Hughes knows many of the lottery winners personally and most are anxious to build economically viable businesses in their markets. Maintaining a five-year license term will actually discourage lottery winners from constructing. Lottery winners may choose to forfeit their licenses rather than have to spend money building inadequate systems due to lack of equipment or rather than putting up systems that serve no useful purpose. We will expand further the equipment availability issue later in these comments.

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<sup>1</sup> In-Sync comments, page 4. Hughes recognizes that non-interconnected service cannot be commercial service under the current provisions of Section 332 of the Communications Act of 1934, as amended.

<sup>2</sup> CTI Comments at paragraph 19.

**Reamortization of Installment Payment Debt and Financing Options** The comments provided a number of variations on the theme of installment payments. Hughes offers no additional comment, as Hughes has already paid in full for his licenses.

Hughes is potentially directly affected by license turn-in options. Hughes restates that a licensee who has paid in full for its licenses should have the opportunity to surrender those licenses and receive a refund. To be fair to all existing licensees, this option must be available to everyone not in default. In his comments, Hughes suggested that those who have already fully paid for their licenses should receive a refund of everything they paid for their licenses, including the down payments. Hughes takes no position as to whether those in default should be eligible for any refund.

It appears that all of the commenters who addressed the subject supported some type of license turn-in option. If the Commission does not find that a full refund is in the public interest, then Hughes urges the Commission to consider seriously the comments of The 218-219 MHz Licensees (“Licensees”). The Licensees point out that the winners of the C-block PCS auction were required to submit only 10 per cent of their bids as the down payment. IVDS auction winners were required to submit 20 per cent of their bids.<sup>3</sup> PCS licensees were provided with an amnesty option of turning in their licenses and forfeiting their down payments. Thus, if the Commission is to be consistent in its amnesty policies, no more than 10 per cent of the bids for IVDS licenses should be considered for retention by the Commission.

Hughes also agrees with the Licensees comments with respect to the 70 per cent credit for the down payment being applied toward bids for other licenses. To be consistent with the C-block PCS plan, half of the IVDS 20 per cent down payment should be refunded and the 70 per cent applied to the remaining part of the down payment (the remaining 10 per cent of the high

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<sup>3</sup> Licensees’ comments, page 9.

bids). Hughes also concurs with Eon Corporation (“Eon”) that the Commission needs to define better when the two-year restriction on reacquiring a license will begin.<sup>4</sup>

Hughes continues to contend that those who have fully paid for their licenses should be given more consideration from the Commission than those under the installment plan, because the Commission has had use of the money equal to the full amount of these licensees’ bids for four years. The interest the Commission should have received on the additional 80 per cent of the high bids of those who have fully paid should warrant the special consideration, as the interest should have more than equaled the total down payment. However, Hughes would consider the Licensees’ proposal as a potential compromise that could be applied to all licensees. Most importantly, those who have fully paid for their licenses must be given options at least equivalent to those with installment payment obligations.

### **Service and Construction Requirements**

In its comments, Hughes stated that the only construction requirement for any licensee should be that of substantial service at the 10-year point. This would be consistent with the construction requirements for the recent LMDS auction winners. Nothing is served by the imposition of a 5-year benchmark or a 10-year, 20 per cent land or population coverage requirement, as suggested by the Commission. In-Sync’s comments also support no construction deadlines prior to ten years. In-Sync states, “Development of ... new communications services is hindered when artificial time limits are placed on construction because resources are diverted from research and technology design needs towards arbitrary regulatory benchmarks.”<sup>5</sup> The public suffers when the Commission’s rules require licensees to build out systems with inferior equipment just to meet an arbitrary construction requirement. Licensees should not be forced to

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<sup>4</sup> Eon comments at paragraph one.

<sup>5</sup> In-Sync comments, page 10.

balance loss of license versus construction of useless systems to retain their licenses. Radio systems should not be deployed before they are fully developed and economically viable.

Hughes disagrees with the comments of Eon and CTI. Both recommend that the Commission retain the five-year construction requirement for lottery winners in the top nine markets.<sup>6</sup> To date, Hughes has neither found truly viable commercial equipment nor has he been able to have equipment developed that will adequately serve his needs. The Eon/CTI argument does no more than bolster sales of whatever equipment may be available at the time of the construction deadline, regardless of its quality, capabilities, or cost.

As pointed out in our comments, Hughes does not subscribe to the theory that a licensee should be forced to buy and use equipment that does not meet its business goals. Hughes has worked hard and spent a great deal of money to have new equipment developed and he is confident that the process will yield fruitful results in the future. No licensee, including Hughes, should be required to buy and utilize equipment that does not meet its needs just to retain its license. Such a requirement amounts to a prescription for failure for the 218-219 MHz Service.

CTI also states that auction winners face much higher costs going forward due to their license debt burden. Hughes, a lottery winner, has not only *fully* met its debt for its licenses obtained in the auction, it has engaged in research efforts to develop new equipment. It makes no sense to require Hughes to build out his lottery market at an earlier time than his auctioned markets. Construction of both should be at the ten-year point of the auctioned licenses. CTI is simply wrong to suggest that lottery winners should be prodded into installing inadequate equipment because they did not pay for their licenses in an auction.

Eon's and CTI's positions do not further the public interest. The Commission's rules should not force licensees to avail themselves of a narrow selection of equipment. In fact,

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<sup>6</sup> Eon comments at the second paragraph under heading "D." CTI comments at paragraphs 19-22.

Hughes questions whether any of the businesses that CTI describes in its comments will ultimately be commercially viable even if equipment is developed. Hughes has spent an enormous amount of time, effort, and money investigating nearly the same offerings that CTI proposes. Equipment requires not only proper design, it must be affordable. Hughes has found no such equipment at this time. Thus the fact that equipment can or might be designed at some arbitrary point in time does not mean that it can be used to establish a profitable business.

Limited availability of equipment that might work from a technical standpoint, but not from an economic standpoint, does not guarantee that the public will be well served by licensees who are required to install such equipment to maintain their licenses. Even more importantly, any current equipment had to be designed to meet the present technical restrictions in the rules, including 500 kHz bandwidth. *The possibility that such restrictions could be relaxed may generate a new line of equipment not yet even on the drawing boards.* The commercial availability of such equipment could well not be for a year or two past the rule relaxation -- and well after some 5-year deadlines.

### **License Transferability**

The majority of commenters, including Hughes, support unrestricted transferability of licenses. ITV, Inc. and IVDS Associates, LLC (“ITV/IALC”) state that the restriction applies to only the original 18 IVDS licensees that have the licenses for the top nine markets.<sup>7</sup> ITV/IALC continues, “this restriction cripples the flexibility on an entrepreneur seeking to develop a nationwide or regional 218-219 MHz service.” In-Sync states, “the ability to cluster markets and aggregate spectrum are critical to the survival of the 218-219 MHz Service.”<sup>8</sup> Bay Area comments that, “if licensees are free to respond to market forces without restrictions on assignment and consolidation of licenses and without technical specifications regarding their

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<sup>7</sup> ITV/IALC comments, page 13.

operations[,] the 218-219 MHz service will quickly bring a wide variety of new services to the American public.” Even Eon sees elimination of the transfer restriction as positive.<sup>9</sup>

CTI’s plea to retain the license transfer restriction is without merit.<sup>10</sup> As previously stated, CTI suggests that lottery licensees should build out systems with whatever equipment may be available. Only after building out systems would CTI permit license transfers. Hughes agrees with ITV/IALC, In-Sync, Bay Area, and others that allowing existing lottery licensees to transfer licenses would actually enhance the likelihood of build outs by permitting market aggregation, contrary to CTI’s contention.

### **Spectrum Aggregation**

The majority of comments supported aggregation of the two spectrum blocks. ITV/IALC point out that the 0.5 MHz spectrum limit “could well have been part of the problem with the development of IVDS service.”<sup>11</sup> Boston Spectrum Associates, L.L.C. and Houston Spectrum Associates, L.L.C. (“Spectrum Associates”) suggest that high-speed Internet access or other services will potentially require both spectrum blocks.<sup>12</sup> In-Sync correctly states that broadband competitors “enjoy not only a head-start in the marketplace, but also significantly more capacity than the 500 kHz now available to IVDS licensees.”<sup>13</sup>

All of these comments are exactly on-point. Only a limited menu of services can be contemplated with 500 kHz of spectrum. Although one MHz is still well below what any cellular or wide band PCS carrier has available, it would open some additional options for the 218-218 MHz Service licensees.

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<sup>8</sup> In-Sync comments, page 11.

<sup>9</sup> Eon comments at the first paragraph under heading “D.”

<sup>10</sup> CTI comments, paragraph 23.

<sup>11</sup> ITV/IALC comments, page 13.

<sup>12</sup> Spectrum Associates comments at paragraph 19.

<sup>13</sup> In-Sync comments, page 12.

CTI opposes aggregation in the nine lottery markets. (CTI appears to contradict itself on aggregation. It infers the smaller auction markets may need additional bandwidth but the much larger top nine lottery markets will not.)<sup>14</sup> Eon also opposes aggregation because it might decrease the potential customer base and chill product development.<sup>15</sup> Hughes believes more bandwidth will serve to enhance the likelihood that new equipment and service offerings will be developed. Allowing aggregation may actually lead to the development of new services and a resultant increase in demand for products, contrary to Eon's contention.

### **Partitioning and Disaggregation**

The majority of commenters support partitioning and disaggregation. Hughes concurs with the majority.

### **Technical Standards**

With limited exceptions, the comments confirm that the technical restrictions currently imposed on the 218-219 MHz Service limit the ability of licensees to develop economically viable service offerings. Most of the technical restrictions were put in place to limit the interference to television channels 10 and 13. ITV/IALC and Concepts to Operations, Inc. ("Concepts") comment correctly that roughly 60 per cent of the households now receive television service from cable television, direct-broadcast satellite, or various forms of MDS, and are thus immune to over-the-air interference.<sup>16</sup> The high subscription rate to alternative video delivery systems alone supports a review of the technical restrictions for the 218-219 MHz Service.

Spectrum Associates states, "so long as the duty cycle requirement remains on the books, a large number of IVDS systems ... will be essentially worthless for high-speed Internet service,

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<sup>14</sup> CTI comments at paragraphs 39 and 40.

<sup>15</sup> Eon comments at the first paragraph under heading "E."

<sup>16</sup> ITV/IALC comments, page 15. Concepts comments, page 4.

streaming video, and other modern technologies.<sup>17</sup> Spectrum Associates also support elimination of the power/antenna height restrictions and an increase in mobile power to four watts.<sup>18</sup> Dispatch Interactive Television Company (“Dispatch”) points out that, “the 100 milliwatt limit represents a difficult, if not impossible, obstacle to the provision of any type of viable service.”<sup>19</sup> These comments are generally parroted by others, including, In-Sync, the Licensees, and the Bay Area 218-219 MHz Group (“Bay Area”).<sup>20</sup> Bay Area proposes that the only requirement to prevent interference should be for the 218-219 MHz licensees, “not to interfere with the lawful operations in other frequencies, while leaving the mean[s] of compliance to their discretion. Should a 218-219 MHz licensee cause interference, it would be responsible for implementation of the remedy.” Other commenters state that other radio services operate near in frequency to television channel 13 without severe power and antenna height limitations.<sup>21</sup>

CTI stated, “CTI has found that the Commission’s current technical rules governing 218-219 MHz do not prevent system deployment.”<sup>22</sup> CTI further says, “CTI’s experience is proof that the current technical rules are not an obstacle to constructing 218-219 MHz systems.” However, CIT goes on to recommend that the Commission should relax mobile power, duty cycle, and antenna height restrictions.<sup>23</sup> So even for the case of a company that claims to have found the current rules to be workable, more flexibility is desired.

Hughes believes that the record supports significant relaxation in the technical restrictions now contained in the Commission’s rules. If AMTS can operate immediately

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<sup>17</sup> Spectrum Associates comments at paragraph 17.

<sup>18</sup> Spectrum Associates comments at paragraphs 19-21.

<sup>19</sup> Dispatch comments, page 6.

<sup>20</sup> *See generally*, In-Sync comments, pages 13-15. Licensees’ comments, pages 15-19. Bay Area comments, pages 6-7.

<sup>21</sup> *See, for example*, Licensees comments, page 17, which point out that the Automated Marine Telecommunications Service (AMTS) stations operate in the 216-218 MHz band which is immediately adjacent to channel 13.

<sup>22</sup> CTI comments at paragraph 13.

adjacent in frequency to television channel 13 with minimal restrictions, then even fewer restrictions should be needed in the 218-219 MHz band. Hughes urges the Commission to remove the oppressive technical restrictions now in the rules. The comments in this proceeding offer several viable options for such relaxation of the technical rules.

### **Incorporation by Reference of Part 1 Standardized Auction Rules**

The majority of the commenters support adoption of the standardized auction rules contained in Part 1 of the FCC Rules and Regulations. Hughes continues to support such standardized rules for the 218-219 MHz service and offers no further comments.

### **Conclusion**

The comments were generally supportive of the Commission's proposals in the *NPRM* to relax the rules for the 218-219 MHz Service. The Commission should act expeditiously to implement relaxed rules to give licensees the flexibility they need to make the service a success. The most critically needed rule changes are those to eliminate unnecessary technical restrictions. This relaxation should spur the development of new and innovative equipment that will help make the 218-219 MHz Service economically viable. Hughes also stresses that the license surrender options *must apply to all licensees not currently in default, including those who have fully paid* for their licenses at this time.

Respectfully submitted,

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<sup>23</sup> CTI comments at paragraphs 34, 35, and 37.